Tentative Rulings for June 5, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG01543 ***Kilgore v. Wells Fargo Home Mrtg*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG00232 ***Corpuz et al. v Saint Agnes Medical Center*** **(Dept. 403) is continued to June 7, 2012 at 3:30 p.m. in Dept. 403 to be heard in conjunction with the motions for summary judgment**

11CECG03802 ***Fiorini v. Phusion Projects, LLC et al.*** **(Dept. 503) is continued to Wednesday June 13, 2012, at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

[10]

Tentative Ruling

Re: ***Lauderdale v. Garcia***
Superior Court Case No. 11 CECG 02841

Hearing Date: **Tues., June 5, 2012 (Dept. 503)**

Motion: **Defendant's Demurrer and Motion to Strike the Second Amended Complaint**

Tentative Ruling:

After continuing the 4/11/12 hearing and after considering the parties' supplemental briefs, the court publishes the following tentative ruling, that is substantially similar to its prior tentative ruling, except for new headings and a new section (B)(2) addressing the arguments set forth in the supplemental briefs.

To OVERRULE the Demurrer to the 1st, 3rd, and 4th causes of action.

To GRANT the motion to strike the 9th cause of action. To strike the 8th cause of action sua sponte. The court sua sponte strikes both the 8th and 9th causes of action because they were filed without leave of court, and also for the additional reasons specified below.

Explanation:

A. Demurrer to 1st, 3rd, and 4th causes of action for Fraud, Elder Financial Abuse, and Conversion

On 12/8/11, Defendant demurred to the 1st, 3rd, and 4th causes of action of the First Amended Complaint. Defendant argued correctly that Plaintiff had failed to file the declaration required by CCP 377.32 and therefore should not be allowed to commence or maintain the lawsuit. (**CCP 377.32**.)

The court provided no analysis of the issue, but ordered Plaintiff to file the declaration. Despite the court's order, Plaintiff still failed to file the CCP 377.32 declaration. So Defendant was forced to bring this demurrer again.

In Opposition, Plaintiff finally filed the required declaration on 3/28/12. So the demurrer is technically moot.

In Reply, Defendant argues that the declaration is deficient. The declaration merely asserts that Evelyn Lauderdale is decedent's trustee and successor-in-interest, but the declaration fails to state facts in support of this assertion. (**CCP 377.32 (a)(5)(A)**.) Defendant argues that a trustee cannot be a successor-in-interest of decedent's estate.

B. Successor-in-Interest

1. Plaintiff trustee properly alleges her standing to sue.

The question before the court is not whether the Plaintiff trustee actually has standing to sue, but rather whether Plaintiff has alleged facts at the pleading stage sufficient to support her allegation that she has standing to sue as decedent's successor-in-interest. (**CCP 377.11, 377.10, 377.32 (a)(5)(A)**.)

When a person dies, any claims that survive her pass to her successor-in-interest. Only a personal representative or a successor-in-interest may bring a lawsuit based on the decedent's claims. (**CCP 377.20**.) Here, Plaintiff does not allege that she is the decedent's personal representative. And there is no evidence of any probate proceeding wherein the court appointed Plaintiff as a personal representative. So if Plaintiff has standing to bring this suit, it must be as the successor-in-interest of the decedent.

The Code of Civil Procedure defines a successor-in-interest as (1) "the beneficiary of decedent's estate" or (2) "other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." (**CCP 377.11**.)

CCP 377.10 defines the "beneficiary of the decedent's estate" as:

(a) a beneficiary who succeeds to a cause of action or an item of property under the will; or

(b) if there is no will, then a person who succeed to claims or property under Probate Code sections 6401 and 6402, governing intestate succession for surviving spouses and other kin.

Because Plaintiff alleges in the Second Amended Complaint that the decedent left a valid will, section **377.10 (a)** controls and section 377.10 (b) does not apply.

Plaintiff alleges that she is the trustee of the living trust established by decedent in 2007. (SAC at Ex. A.) And she was co-executor of decedent's 8/23/07 will, deposited with the court on 10/17/11 in case number 11 CEPR 00900. The will provided that her entire estate would be given as a gift to the trustee of her 2007 trust, as "pour-over beneficiary."

Accordingly, if a trustee of a living trust is named as a beneficiary, who succeeds to a cause of action or item of property under a valid will, then the trustee would

appear to qualify as a beneficiary of decedent's estate and as a successor-in-interest of decedent.

The language of **CCP 377.10** is somewhat ambiguous, because it neither expressly includes nor expressly excludes trustees of living trusts as beneficiaries. The Law Revision Committee Comments state that **CCP 377.10** was "a new provision drawn from **Probate Code 13006**. And **section 13006** expressly provides that trustees of certain living trusts do qualify as beneficiaries of the estate and as successors-in-interest. ""For purposes of this part, a trust is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will."

The Law Revision Commission Comments to **section 13006** state that "A trustee of a trust created by the will of the decedent is not a beneficiary under the decedent's will for purposes of this part. Only the trustee of a trust created during the decedent's lifetime that is entitled to all or a portion of the decedent's property may act as a successor of the decedent under this part."

So it remains unclear why, in drafting **CCP 377.10**, the California Legislature did not include specific language from **section 13006** regarding trustees of living trusts. Did the Legislature intend to exclude such trustees as persons who could maintain a lawsuit, or did the Legislature believe that it was so obvious that trustees qualified as beneficiaries that it was unnecessary to include specific language including trustees as beneficiaries?

Defendant argues that, at the time the will was signed, decedent was still the trustee of her own trust, so that Plaintiff does not qualify as the trustee under the will. But this argument fails because CCP 377.10 refers to beneficiaries of decedent's estate under the will. So the plain meaning of CCP 377.10 is that the beneficiary is to be determined after the decedent's death.

The Law Revision Commission Comments to **CCP 377.30** appears to expressly provide that a trustee may qualify as a successor-in-interest. "The distributee of the cause of action in probate is the successor in interest or, if there is no distribution, the heir, devisee, trustee, or other successor has the right to proceed under this article."

And **CCP 369** provides that either the personal representative or the trustee of an express trust may sue without joining as parties the persons for whose benefit the action is prosecuted.

Accordingly, the court concludes that Plaintiff, at the pleading stage, has set forth facts in her declaration sufficient to allege her standing to maintain this action.

This does not constitute a final adjudication of the matter. The court makes no factual findings as to whether Plaintiff is a genuine trustee, beneficiary, or successor-in-interest under the law. The court merely concludes that Plaintiff has pled facts that, if proven true at trial, would establish that Plaintiff has standing to sue as successor in interest. Defendant is still free to challenge Plaintiff's standing to maintain this suit on a

motion for summary judgment or at trial. And if the matter is raised again, the parties are free to file additional briefs addressing this mixed question of law and fact.

Defendant has filed a petition in probate seeking to remove Plaintiff as the trustee. (11 CEPR 01018.) Defendant argues that in that case Plaintiff has attacked the validity of certain testamentary documents, namely the first and third amendments to the trust. But Plaintiff's arguments in the Petition do not appear to contradict the standing argument she raises in her Opposition.

2. Supplemental briefing.

Defendant Garcia argues that Plaintiff does not automatically qualify as the decedent's successor-in-interest simply because she is the trustee of the decedent's trust. But the problem is that on a demurrer, the burden is on Defendant Garcia to show that Plaintiff has no standing as a matter of law and that Plaintiff cannot be the decedent's successor-in-interest. So Defendant Garcia must be able to show, from the allegations of the Complaint or from matters properly subject to judicial notice, that Plaintiff lacks standing. But this Garcia has failed to do. Based on the allegations of Complaint, it is possible for Plaintiff to have standing to sue. Whether Plaintiff actually does have standing to sue is a mixed question of law and fact that can only be decided on a motion for summary judgment or at trial.

Defendant Garcia relies on three cases, each of which is distinguishable. In Lickter v. Lickter (2010) 189 Cal.App.4th 712, 718, the court of appeal considered the question of whether two grandchildren who were beneficiaries of a trust had standing to bring an elder abuse suit on behalf of their deceased grandmother, as interested persons under Welfare & Institutions Code section 15657.3 (d)(1)(C).. That case was distinguishable from the instant case because it was a motion for summary judgment, not a demurrer. And the grandchildren were not trustees of the trust. In fact, the court of appeal in Lickter observed that as the trustee of decedent's trust, Robert Lickter, the plaintiffs' father, was the personal representative of his deceased mother, so he would have standing to bring an elder abuse suit on her behalf. (Lickter v. Lickter (2010) 189 Cal.App.4th 712, 723.) This holding cuts against Defendant Garcia's argument.

In Parsons v. Tickner (1995) 31 Cal.App.4th 1513, 18 years after the death of her father, a well-known country music performer, his daughter sued to recover his music catalogue which had been wrongfully converted by his former managers. The court of appeal held that as an intestate heir, she qualified as the decedent's successor-in-interest and had standing to sue. This case does not address the question of whether or when a trustee of a decedent's estate has standing to sue. So the case has no relevance here. The case does not stand for the proposition that only an intestate heir who stands to inherit property may sue to recover it. The case simply does not address the situation involving a trustee of a trust.

In Exharos v. Exharos (2008) 159 Cal.App.4th 898, as Defendant Garcia admits, the proposed successor-in-interest was not a trustee of decedent's trust. So once again the case does not apply here.

Motion to Strike
8th Cause of Action for Recovery of Funds
(Probate Code 859)

The court sua sponte strikes this cause of action without leave to amend for three reasons. First, it was filed without leave of court. Plaintiff must bring a noticed motion seeking leave to amend before she adds new causes of action or new prayers for relief. Second, the cause of action is confusing because it also cites Probate Code 850, which does not appear to be relevant.

And third, **Probate Code 859** appears to be solely a remedy provision. It doesn't appear to create an independent cause of action. Section 859 permits Plaintiff to recover double damages if the Defendant "has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent." So if Plaintiff is seeking to assert this remedy, Plaintiff needs to seek leave to amend its prayer for damages.

Motion to Strike
9th Cause of Action for Undue Influence

A. Failure to Seek Leave of Court

The court sua sponte strikes this cause of action without leave to amend because it was filed without leave of court. Plaintiff must bring a noticed motion seeking leave to amend before she adds new causes of action or new prayers for relief.

B. No Cause of Action for Undue Influence

Second, the court also strikes this cause of action without leave to amend because there is no such thing as a cause of action for undue influence. Typically, a defendant will raise undue influence as an affirmative defense to defeat a plaintiff action to enforce a contract.

At one time, a party alleging undue influence could bring a cause of action for rescission of contract due to undue influence. (**Bozarth v. Birch** (1921) 52 Cal.App. 55, 59-60 [where plaintiff alleges undue influence proper cause of action was for rescission].)

But now the cause of action for rescission has been abolished. So it appears that rescission is a remedy or form of relief, and not a formal cause of action. "Pursuant to a recommendation of the Law Revision Commission, the equitable action to have a rescission adjudged was abolished in 1961, and the statutes now deal solely with unilateral rescission by notice and offer to restore the consideration." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 930, pp. 1026-1027.)

"The Civil Code originally provided for rescission by a party (C.C. 1689) and also for an action to have a rescission adjudged (former C.C. 3406.) [citations omitted].

Later cases made it clear that a party having the right to rescind could accomplish a completed rescission by taking the steps specified in C.C. 1691." (Idem.)

In other words, if a plaintiff wants to rescind a contract, she would normally comply with the requirements of Civil Code 1691. She would normally not need to bring an equitable cause of action for rescission.

C. Restitution

It appears that Plaintiff may have intended to bring a cause of action for "RESTITUTION after completed unilateral rescission." (4 Witkin, California Procedure (5th ed. 2008) Pleading, § 541, pp. 668-669.)

"The traditional equitable action to have the rescission of a contract adjudged was recognized in former C.C. 3406. Its purpose was not only to terminate future obligations under the contract but to restore the parties to their former position by requiring, whenever possible, the restoration of consideration received or its value." (Id.)

"The equitable action was abolished in 1961, and the remedy is now a legal action for restitution based on a completed unilateral rescission. The plaintiff after unilateral rescission may plead a cause of action for restitution in the form of a common count." (Id.)

"Although notice and offer to restore are still required, they need not occur before the action, and therefore need not be alleged in the complaint. If the notice or offer has not been otherwise given, the service of a pleading in an action or a proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both." (Id.)

D. No Contract Alleged

Defendant argues correctly that if Plaintiff is seeking to rescind a contract, then Plaintiff must identify that contract. But Plaintiff has failed to identify any such contract.

E. Probate Action to Invalidate Will or Testamentary Document

If Plaintiff is seeking to invalidate a will or testamentary document, then she must bring a petition in the probate division of this court. She already appears to have done this in 11 CEPR 01018. If she is already petitioning to invalidate the first and third amendments to the trust in the probate division, it is not necessary for her to simultaneously assert the same claim in the unlimited civil division.

On the contrary, to simultaneously bring two identical claims in the probate and unlimited civil divisions would create a risk of conflicting rulings and would also waste judicial resources.

A probate contest requires a specialized legal inquiry. Defendant argues correctly that the "undue influence" analysis in a probate case is different from the

"undue influence" analysis in a typical breach of contract case. (Cf. **O'Neil v. Spillane** (1975) 45 Cal.App.3d 147, 155.)

"The rule proposed by appellants has applicability only to will contest cases where the testamentary capacity and the freedom of will of a testator are questioned. In such cases the test of proving undue influence is indeed whether the legatee exercised 'a pressure which overpowered the mind and bore down the volition of the *testator* at the very time the will was made,' and that 'the influence was such as, in effect, to destroy the *testator's* free agency and substitute for his own another person's will.'" (Id.)

"However, the cases make it evident that in order to prove that one is in a mentally weakened condition within the meaning of section 1575 it is not necessary to show total incapacity to contract, but only that the grantor is lacking in such mental vigor as to enable him to protect himself against an imposition." (Id.)

Accordingly, the court strikes the 9th cause of action without leave to amend.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-4-12** (Date).

(19) **Tentative Ruling**

Re: ***Gosserand v. Tuscany Villas Condominiums***
Superior Court Case No. 09CECG02422

Hearing Date: June 5, 2012 (Dept. 503)

Motions: 1) by defendant BBQ Galore for determination of good faith settlement

2) by defendant Suburban Propane for determination of good faith settlement

3) by Tuscany defendants for determination of good faith settlement

Tentative Ruling:

To deny without prejudice.

Explanation:

1. Basic Standards

"At a minimum, a party seeking confirmation of a settlement must explain to the court and to all other parties: who has settled with whom, the dollar amount of each settlement, if any settlement is allocated, how it is allocated between issues and/or parties, what nonmonetary consideration has been included, and how the parties to the settlement value the nonmonetary consideration." *Regan Roofing Co. v. Superior Court* (1994) 21 Cal. App. 4th 1685, 1700.

"To those *Alcal* guidelines, we added in *Erreca's* the considerations that the party seeking confirmation of a settlement must explain to the court and to all other parties the evidentiary basis for any allocations and valuations made, and must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify a presumption that the valuation reached was reasonable." (*Id*. at 1700-1701.)[1]

What is "required of the settling parties is that they furnish to the court and to all parties an evidentiary showing of a rational basis for the allocations made and the credits proposed. They must also show that they reached these allocations and credit proposals in an atmosphere of appropriate adverseness so that the presumption may be applied that a reasonable valuation was reached." (*Id*. at 1704.)

2. Evidentiary Void

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[1] The Court is referring to *Alcal Roofing & Insulation v. Superior Court* (1992) 8 Cal. App. 4th 1121, 1129 and *Erreca's v. Superior Court* (1993) 19 Cal. App. 4th 1475.

The Tuscany defendants ("Tuscany") have failed to provide any evidence of their proportion of liability or lack thereof. They make very strong arguments that the fault was on the part of Tommy Rock, and that Tommy Rock was the agent of opposing defendant. But there is no evidence to back that up. There is no declaration from a Tuscany/Premier employee. Without evidence, Tuscany's claim it should bear no more than 4% of the total liability cannot be determined to be made in good faith. *Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal. App. 4th 1337, 1350-1352. A declaration from counsel for the settling party is generally insufficient. *Greshko v. County of Los Angeles* (1987) 194 Cal. App. 3d 822, 834.

There is no evidence from the other moving defendants other than the declarations of defense counsel. In contrast, the Davis Companies ("Davis") have provided admissible evidence of their lack of insurance, as well as to their lack of liability. There is no controverting evidence on moving defendants' side of this issue. On the record before the Court, the motions are denied on this ground.

4. There is Evidence of Collusion

The contract provided by Davis shows that Premier was the owner of Tuscany Villas. Page 14 of the contract, in Article 6, has the owner (Premier) specifically reserving the right to do part of the construction by itself or have a separate contractor do it. When the owner does that, the contract provides that the owner steps into the shoes of, and has the same obligations of, the contractor. Tuscany is relying solely on Article 3, which applies only where Davis' own subcontractor did the work at issue. (See paragraph 9 of Cohen's Decl., and the contract, Exhibit B to Davis' counsel's declaration.)

However, if Article 6 does in fact apply to the work of Tommy Rock, it would appear that Tuscany/Premier owes Davis a defense and indemnity, not the other way around. The proposed settlement seeks to ensure that Davis ***cannot*** contribute, even if plaintiffs would have taken the $50,000, so that Davis may not seek a good faith determination of its own contribution and thereby avoid Tuscany's suit.

Moving parties' proposed apportionment of liability by the proposed settlement is, as noted above, not supported evidentiarily. Tuscany says that Tommy Rock was Davis' agent, Davis says that Tuscany's owner insisted on the grill work being done by Tommy Rock even though Davis wanted to do the work itself. Perhaps Tuscany did that precisely because the duty of care regarding the grill was non-delegable, and it wanted more control over that particular aspect of the construction process. Davis has provided a declaration from an employee to support this, and such evidence supports the application of Article 6 of the contract.

The $345,000 figure indeed falls within the range of permissible settlements for a case like this. The problem is that the $290,000 to be paid by Tuscany admittedly does not represent Tuscany's portion of that liability. As Tuscany relates in its opposition, Tuscany considers its portion of liability for settlement purposes to be $15,000 – or 4%. What Tuscany wants is to prevent Davis from using Article 6 to shift Article 3's application to Tuscany and Premier, while at the same time preventing Davis from

settling at all with plaintiffs, as well as setting up Davis as the "fall guy" to repay 100% of Tuscany's settlement amount, fees, and costs.

An important consideration in determining good faith is "the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal. 3d 488, 499. "Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive when it is aimed to injure the interests of an absent tortfeasor." *River Garden Farms, Inc. v. Superior* Court (1972) 26 Cal. App. 3d 986, 996.

The settlements here presented meet that definition of "collusive." Paragraph 18 of Tuscany's counsel's declaration (Mr. Cohen) states that "settling defendants instead decided to 'buy' Davis share of liability and then pursue their own cross-complaint for express contractual indemnity against Davis." By "Buy" they mean "set a figure Tuscany agreed that Davis was liable." Moving defendants and plaintiffs are not permitted to set a figure for another defendant's responsibility without its consent.

Moving parties' (and plaintiffs') decision that Tuscany should be no more than 4% liable and that Davis should be 80% liable is not reasonable. Tuscany may instead be 100% liable, if it or Premier made the decision that Tommy Rock would do the work instead of Davis. In fact, Tuscany and Premier may owe Davis attorney's fees and costs, under Article 6 of the contract, wherein Tuscany and Premier are deemed "Contractor" where they chose the "Contractor" themselves. The Court is required to consider Tuscany/Premier's liability to Davis as part of the good faith equation. See *TSI Seismic Tenant Space, Inc. v. Superior Court* (2007)149 Cal. App. 4th 159, 166.

The proposed settlement is designed to injure the rights of Davis, and is collusive. The motions are denied on this ground as well.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **5-29-12** (Date).

(18) Tentative Ruling

Re: ***Dayna Goldsberry, et al. v. Citi Residential Lending, Inc., et al.*** **Case no. 09CECG01680**

Hearing Date: **June 5, 2012 (Dept. 502)**

Motion: By defendant American Home Mortgage Servicing, Inc. (AHMSI) for summary judgment against plaintiff Dayna Goldsberry

Tentative Ruling:

To deny.

Explanation:

The motion is once again largely premised on facts deemed admitted as to plaintiff Anguiano. However, facts established through requests for admissions are binding only on the party who responds to the requests or to whom they were directed. (Cal. Civ. Proc. Code § 2033.300-2033.410.) Defendant has therefore not carried its initial burden of showing plaintiff's claim has no merit.

Pursuant to CRC rule 3.1312, and CCP section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **DSB** (Judge's initials) **on** **6-4-12** (Date).

Tentative Ruling

(24)

Re: ***Wild, Carter & Tipton v. Victoria Scott Yeager, et al.***
Court Case No. 09CECG00045

Hearing Date: **June 5, 2012 (Dept. 402)**

Motion: Plaintiff's Motion to Compel Deposition Testimony of Donald Lesser and Production of Documents

Tentative Ruling:

To grant.

Explanation:

Although deposing opposing counsel is presumptively inappropriate and requires extremely good cause, such depositions may be taken where a proper showing is made. [*Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1496; *Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, 1562s] In *Spectra-Physics, Inc. v. Superior Court*, *supra,* the court developed the following three-factor test: 1) whether the information is crucial to the case; 2) whether there is any other way to obtain the information; and 3) whether it is relevant and not privileged. This same test appears to apply even to situations where the deposition of former counsel is sought (even though there are apparently no California cases directly on this issue, plaintiff has cited to a persuasive Federal Court case out of California). [See, *e.g.*, *Nemirofsky v. Seok Ki Kim*, 523 F. Supp. 2d 998, 1000-1001 (N.D. Cal. 2007)]

In *Carehouse Convalescent Hospital v. Superior Court, supra,* the court found that the party asserting the privilege has the burden of proving that the information sought is indeed privileged. [*Carehouse, supra,* 143 Cal.App.4th at 1563] Since no opposition to this motion has been filed, defendants have failed to carry this burden.

Furthermore, there is no attorney-client privilege with respect to a communication relevant to an issue of breach of duty. In other words, the privilege is waived when a client sues his attorney for malpractice, or breach of fiduciary duty, or when the attorney sues the client for nonpayment of fees. [Evidence Code § 954; *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 383; see also *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 228; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786—attorney can reveal confidences to defend against malpractice claim or fee dispute; and *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1168 (same)] The court grants plaintiff's request for judicial notice, and observes that the malpractice action filed by defendants against Mr. Lesser in Sacramento County, reflects that defendants not only make the *Bowlin, Yeager,* and *AMD* actions (cited to in plaintiff's moving brief) the subject of that lawsuit, but they also make this very case the subject of their malpractice claim against Mr. Lesser. Since no opposition has been filed to the motion, the parties asserting the privilege have made

no showing that a privilege exists. Therefore, it does not appear that defendants can assert the attorney-client privilege to prevent Mr. Lesser's deposition testimony. If any work product privilege exists, it has also not been asserted by Mr. Lesser, the holder of the privilege. [*State Comp. Ins. Fund v. Sup.Ct. (People)* (2001) 91 Cal.App.4th 1080, 1091; *Fellows v. Sup.Ct. (Allstate Ins. Co.)* (1980) 108 Cal.App.3d 55, 63]

Plaintiff has also shown sufficiently on this unopposed motion that the information sought is crucial to the malpractice cross-complaint defendants have filed in this action, and that plaintiff has sought this information directly from defendants, who have claimed not to recall the information sought. Therefore, it appears that deposing Mr. Lesser is the only way to obtain this information.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH **on** 6/4/2012 .
(Judge's initials) (Date)

(25)

Tentative Ruling

Re: ***Stacy Floratos v. United Parcel Service; Michael Torosian; Debra Raco; and Neal McLens***
Superior Court Case No. 11CECG00670

Hearing Date: Tuesday, June 5, 2012 **(Dept. 501)**

Motion: Applications to admit David T. Barton and Marian Zapata-Rossa as counsel *pro hac vice*

Tentative Ruling:

To GRANT.

Explanation:

California Rules of Court, rule 9.40 sets forth the requirements for eligibility to be admitted pro hac vice in this state. If such requirements are met, the decision whether to admit or deny the application is a discretionary decision.

The applicants meet the mandatory provisions of California Rules of Court, rule 9.40, and the Court exercises its discretion to admit them for this case.

Pursuant to California Rules of Court, rule 391, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith **on** 6/1/12 **.**
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: *Rodriguez et al. v. Korkorian et al.*
Superior Court Case No. 11 CECG 00393

Hearing Date: June 5, 2012 (Dept. 403)

Motion: Summary Judgment by Defendant Fresno Heart Hospital, LLC dba Fresno Heart and Surgical Hospital

Tentative Ruling:

To grant the motion. The Defendant has met his burden pursuant to CCP § 437c (p)(2). Plaintiff has failed to meet his burden of presenting expert opinion evidence that creates a triable issue of material fact as to whether the Defendant met the applicable standard of care. The prevailing party is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's tentative ruling.

Explanation:

This is a professional negligence case. On December 9, 2011 Defendant Fresno Heart Hospital, LLC filed a motion for summary judgment. The hearing was continued from February 9, 2012 to June 5, 2012. A statement of non-opposition was filed on May 1, 2012. It

It has been held that the standard of care against which the acts of a physician and other health care providers are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proven by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman. See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 and *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 271-273. California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports its motion with expert declarations that its conduct fell **within** the standard of care, it is **entitled** to summary judgment unless the plaintiff comes forward with conflicting **expert** evidence. See *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985 and see *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493.

In the instant motion, the Defendant submits the Declaration of Philip E. Bickler, M.D. as one of its expert witnesses. He received his Medical Degree from the University of California at San Diego. He has been "board certified" in the field of Anesthesiology since 1992. He is currently a Professor of Anesthesia at the University of California, San Francisco (UCSF) and the Director of its Department of Anesthesia Human Studies Laboratory. See Declaration of Bickler at ¶ 1.

Dr. Bickler has reviewed the medical records of Plaintiff Juan Manuel Rodriguez from the Fresno Heart Hospital and the deposition transcripts of Audrey Peer, Kerry Carpenter, Julie Carlock, Valeriu Albu, Dr. Keith Boone and Janet Chisholm. See ¶ 5. Ultimately, Dr. Bickler opines that "the care and treatment rendered to Plaintiff Juan Manuel Rodriguez by Fresno Heart Hospital was in all respects appropriate and well within the standard of care…In sum, I did not identify any failure on the part of the non-physician employees of Fresno

Heart Hospital." See ¶ 12. He also opines that Fresno Heart Hospital had no duty to obtain informed consent. This is the responsibility of the physician. See ¶ 13. Finally, Dr. Bickler opines that "to a reasonable medical probability the acts or omissions of Fresno Heart Hospital did not cause, contribute to or exacerbate the injuries of which Plaintiffs complain." See ¶ 14 of the Declaration of Bickler.

The Defendant also submits the Declaration of Janet Chisholm. She is the Director of Health Information Management, the Director of Medical Staff Services, the Compliance and Privacy Officer and the Custodian of Records for Defendant Fresno Heart Hospital, LLC dba Fresno Heart and Surgical Hospital. Attached to her Declaration are the medical records of Plaintiff Juan Rodriguez in electronic format. Chisholm states that Drs. Korkorian and Boone were not agents, servants, employees nor joint-venturers nor copartners with the Defendant Hospital. See ¶¶ 4 and 6 of the Declaration of Chisholm. In addition, Community Regional Anesthesia Medical Group was not an agent, servant, employee nor joint-venturer nor copartner with the Defendant Hospital. See ¶ 8. She further submits that the Hospital followed the appropriate credentialing and peer review process in granting privileges to Drs. Korkorian and Boone. See ¶ 9. Finally, Chisholm states that Dr. Korkorian did not inform the Hospital that he had a brain tumor or any other physical or mental impairment prior to performing the intubation on the Plaintiff. See ¶ 10.

Finally, the Defendant submits the Declaration of Paul Hoffman, Dr. P.H., FACHE. He is the President of Hofmann Health Care Group. He is a Doctor of Public Health. He earned his degree from the School of Public Health at the University of California, Berkeley. See ¶ 1 of the Declaration. He has reviewed the medical records of Plaintiff Juan Manuel Rodriguez from the Fresno Heart Hospital and the deposition transcripts of Audrey Peer, Kerry Carpenter, Julie Carlock, Valeriu Albu, Dr. Keith Boone and Janet Chisholm. See ¶ 5. He too opines that Drs. Korkorian and Boone were not agents, servants, employees nor joint-venturers nor copartners with the Defendant Hospital. See ¶¶ 7-8. In addition, Community Regional Anesthesia Medical Group was not an agent, servant, employee nor joint-venturer nor copartner with the Defendant Hospital. See ¶ 9. Hoffman further submits that the Hospital followed the appropriate credentialing and peer review process in granting privileges to Drs. Korkorian and Boone. See ¶ 10. He too states that Dr. Korkorian did not inform the Hospital that he had a brain tumor or any other physical or mental impairment prior to performing the intubation on the Plaintiff. See ¶ 11. Ultimately, Hoffman opines that the acts or omissions of the Hospital did not cause, contribute to or exacerbate the injuries of which Plaintiffs complain. See ¶ 15.

The Defendant has met its burden pursuant to CCP § 437c (p)(2). Plaintiff Juan Manuel Rodriguez has failed to meet his burden of presenting expert opinion evidence that creates a triable issue of material fact. See *Munro v. Regents of University of California (1989) 215 Cal.App.3d 977, 984-985.* Therefore, the motion will be granted. As for the cause of action for loss of consortium filed by Plaintiff Marisol Rodriguez, given the failure of her husband's claims, summary judgment must be granted in favor of the moving Defendant as well. "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067)

Pursuant to California Rules of Court, Rule 3.1312(a) and Code of Civil Procedure §1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) on **6/1/12** (Date)

03

Tentative Ruling

Re: ***Thornton v. Bellew***
Case No. 10 CE CG 02257

Hearing Date: June 5th, 2012 (Dept. 402)

Motion: Defendant Floyd Johnston Co., Inc.'s Motion for Summary Adjudication of Plaintiffs' Exemplary Damage Claims

Tentative Ruling:

To grant defendant Floyd Johnston Co.'s motion for summary adjudication of the punitive damage claims of plaintiff Matthew Thornton. (CCP § 437c.) To deny the motion for summary adjudication as to plaintiff Kenneth Turley, as the parties have now settled Turley's claims and therefore the motion is moot as to him.

Explanation:

According to Civil Code § 3294(a),

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Also, under Civil Code § 3294(b),

> An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

'"While an employer may be liable for an employee's tort under the doctrine of respondeat superior, he is not responsible for punitive damages where he neither directed or ratified the act. [Citations omitted.] [para.] California follows the rule laid down in Restatement of Torts, section 909, which provides punitive damages can properly be awarded against a principal because of an act by an agent if, but only if "(a) the principal authorized the doing and the manner of the act, or (b) the agent was

unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the employer or a manager of the employer ratified or approved the act.'"" (*Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, at 18.)

Here, defendant FJC, which is a corporation, has met its burden of producing evidence showing that none of its officers, directors or managing agents had any advance knowledge of the unfitness of Bellew to drive a company vehicle, and none of the officers, directors or managing agents of FJC authorized or ratified Bellew's conduct when he drove under the influence and caused plaintiffs' injuries. (See decl. of Evelyn Johnston, ¶¶ 9, 10, 11, 18, 19, 20.) Defendant's evidence also states that none of the company's officers, directors, or managing agents was personally guilty of oppression, fraud or malice with respect to the accident. (*Id*. at ¶ 21.)[2]

In addition, according to defendant's vice-president and secretary Evelyn Johnston, the company has a policy that expressly forbids company employees from using alcohol on duty, or when using company vehicles. (*Id*. at ¶¶ 7, 8.) Bellew was provided with a copy of this company policy prior to the accident. (*Id*. at ¶ 7.)

The company's officers, directors and managing agents had no advance knowledge that Bellew ever drove the company vehicle while under the influence, and they never authorized Bellew to drive under the influence or ratified his driving a company vehicle under the influence. (*Id*. at ¶¶ 9 – 11.) No officer, director or managing agent had any advance knowledge of any previous conduct on the part of Bellew that would have rendered him unfit to work for FJC. (*Id*. at ¶ 18.) Also, no officer, director or managing agent had any advance knowledge of any alcoholic behavior on the part of Bellew that would have rendered him unfit to drive the company vehicle. (*Id*. at ¶ 20.)

Furthermore, according to defendant's evidence, Bellew was not an officer, director or managing agent of FJC. (*Id*. at ¶ 12.) He was a foreman, and his duties were limited to directing the work of his crew at the job site. (*Ibid*.) He never held a policy-making decision with FJC, and he had no corporate managerial responsibilities with FJC. (*Ibid*.)

In addition, when Bellew was involved in the accident, he was not acting in the course and scope of his employment with FJC. (*Id*. at ¶ 13.) He was drinking beer at his friend's house, not acting as foreman for FJC. (*Id*. at ¶ 14.) He was driving the company pickup for his own personal reasons, which were totally unrelated to his work for FJC. (*Id*. at ¶ 15.) He was not being paid by FJC at the time of the accident. (*Id*. at

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[2] Plaintiff Thornton has attempted to raise objections to defendant's evidence. However, the objections are not properly before the court, since plaintiff merely sets forth objections in the separate statement rather than submitting separate objections in the format required under Rule of Court 3.1354. Plaintiff has also failed to include a proposed order on the objections as required under the Rules of Court. Therefore, the court declines to rule on the merits of the objections.

¶ 16.) He was not working on any job for FJC, nor was he driving to or from any job with FJC. (*Id*. at ¶ 17.)

Therefore, defendant has met its burden of showing that it did not have advance knowledge of Bellew's unfitness to drive a company vehicle, nor did it authorize, ratify or personally participate in any wrongful conduct. As a result, unless plaintiff can present evidence raising a triable issue of material fact as to whether defendant had advance knowledge of Bellew's unfitness, or authorized, ratified or personally participated in the wrongful conduct, or showing that Bellew was himself an officer, director or managing agent of the company, defendant is entitled to summary adjudication of the punitive damage claim.

Plaintiff Thornton argues that FJC ratified Bellew's conduct after the fact by failing to terminate him, demote him, cut his pay, or even take away the company truck after the accident. He points out that Bellew told the owner of the company, Floyd Johnston, the day after the accident about what had happened and that he had been under the influence at the time of the accident. (Turley's Facts No.'s 31, 32.) While Bellew was reprimanded, he did not lose his position, he did not suffer a cut in pay, he still supervised a crew, and he was still allowed to drive the company truck. (Facts 33, 34, 35.) Even after losing his license because of the DUI, the company continued to have Bellew chauffeured to and from the job site in the truck. (Fact 36.) It was not until about a year after the accident that Bellew was finally terminated from the company, and he was only terminated because the company could no longer insure him, not because he violated company policy. (Facts 37, 38, 39.) Thus, plaintiff argues that FLC ratified Bellew's use of the company truck while intoxicated by failing to terminate him or take other measures to punish him for his conduct.

It is true that an employer's failure to terminate an employee or take other measures against him after he or she commits an act of oppression, fraud or malice can indicate ratification of the employee's conduct. (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852.) However, the employee's wrongful conduct must have occurred in the course and scope of his or her employment, or while he or she was acting as the company's representative. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723.)

"The obvious point is that in performing, ratifying, or approving the malicious conduct, the agent must be acting *as the organization's representative*, not in some other capacity." (*Ibid*, emphasis in original.)

"[W]hatever the meaning of 'managing agent' under pre or poststatutory law, the concept assumes that such individual was *acting in a corporate or employment capacity* when the conduct giving rise to the punitive damages claim against the employer occurred. [Citations] No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein. We cannot conceive that Civil Code section 3294, subdivision (b) intended such a result." (*Id.* at 723-724*,* emphasis in original.)

Here the plaintiff has made conclusory allegations in the complaint that Bellew was acting in the course and scope of his employment for defendant at the time of the accident, yet the evidence shows that he was actually not working for defendant when he drove under the influence. (Johnston decl., ¶¶ 13, 14, 15, 16, 17.) Plaintiff has not presented any evidence that would tend to show that Bellew was acting in the course and scope of his employment when he hit plaintiffs' car.

Thornton has suggested that Bellew was acting in the course and scope of his employment because, just prior to the accident, his company cell phone rang and distracted him, and this is what caused him to look away from the road and hit plaintiffs' car. (Thornton's Fact No. 20.) However, plaintiff has not cited any authorities that would support the theory that simply receiving a phone call on an employee's company phone is enough to show that the employee was acting in the course and scope of employment at the time of the wrongful conduct. It appears from the evidence that Bellew did not actually answer the phone, and it is not even clear that the call was work-related, so there does not appear to be any basis for concluding that Bellew was acting in the course and scope of employment just because his company phone rang and distracted him. (Exhibit C to Thornton's Separate Statement, Bellew depo., pp. 122:22 - 124:24.) Therefore, plaintiff has failed to raise a triable issue of material fact as to whether Bellew was acting in the course and scope of his employment when he drove under the influence. Because Bellew was not acting as a representative for FJC at the time of the accident, FJC cannot have ratified his misconduct, and it cannot be held liable in punitive damages for Bellew's actions. (*College Hospital, supra*, 8 Cal.4th at 723-724.) Therefore, FJC is entitled to summary adjudication of the punitive damage claim.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 6/4/2012 .

(Judge's Initials) (Date)

(17) **Tentative Ruling**

Re: ***California Capital Ins. Co. v. Kohler Co. et al.***
Superior Court Case No. 10 CECL 08828

Hearing Date: June 5, 2012 (Dept. 402)

Motion: Motion to Tax Costs

Tentative Ruling:

To grant the motion to tax costs in the amount of $2,733.71.

Explanation:

The Judgment Awarding Untaxed Costs of Suit is Subject to Correction

Because the costs were prematurely entered, they are subject to being corrected by the court as a clerical error. '"The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain power to correct clerical errors in a judgment which has been entered."' (*Rochin v. Pat Johnson Manufacturing Co*. (1998) 67 Cal.App.4th 1228, 1237.) "A trial court may correct a clerical error, but not a judicial error, at any time." (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205.)

The court's duty to award costs to the party entitled to them under Code of Civil Procedure section 1032 is ministerial. (*Miles California Co. v. Hawkins* (1959) 175 Cal.App.2d 162, 165.) The statutory right to costs is not lost by virtue of the court's neglect or error because such neglect or error may be corrected by the trial court. (*Ibid*.; see also *Williams v. Santa Maria Joint Union High Sch. Dist*. (1967) 252 Cal.App.2d 1010, 1013.) Thus, to the extent the cost provisions of the instant judgment violated Code of Civil Procedure section 1032, this court is authorized to correct the judgment to reflect the statutory command, in the same manner it is empowered to remedy any other clerical error in the judgments. (Code Civ. Proc., § 473; *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co*. (1990) 223 Cal.App.3d 924, 928.) In sum, the allowance of costs to the statutorily entitled party is a clerical act. If it cannot be defeated by judicial omission, it likewise cannot be defeated by judicial commission. In each instance, the court retains the full power to conform the recital in the judgment to the mandate of the law. (*Id*. at p. 928.)

Certain Costs Should Be Taxed

Travel Costs for Expert Redding to Deposition

In Item 8, "Witness Fees," defendant Kohler claims $1,518.75 for travel costs for their witness, John Redding, to attend trial. Kohler is not entitled to these costs. John Redding was designated as a non-retained expert witness by Kohler. (Graham Decl. ¶

2; see also Opposition at 3:17-19.) He testified he was a regular employee of Kohler at deposition. (Graham Decl. ¶ 2; Opposition at 3:20-21.)

This time is not recoverable as an expert witness fee under Code of Civil Procedure section 998. Setting aside the question of whether Kohler's offer of a waiver of costs was a valid 998 offer, employees of parties are simply not considered experts such that their fees are recoverable under section 998. Section 998 provides, in pertinent part:

> If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post offer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, *who are not regular employees of any party*, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

(Code Civ. Proc. § 998, subd. (c)(1)(emphasis added).)

To the extent that Kohler claims Mr. Redding was also a percipient witness and entitled to his travel costs under Code of Civil Procedure section 1033.5, subdivision (a)(7), such costs are limited by Government Code section 68093: "[e]xcept as otherwise provided by law, witness' fees for each day's actual attendance, when legally required to attend a civil action or proceeding in the superior courts, are thirty-five dollars ($35) a day and mileage actually traveled, both ways, twenty cents ($0.20) a mile." The problem is that Mr. Redding was never actually called as a witness, and therefore never actually attended trial such that he was entitled to witness fees. If Mr. Redding had been subpoenaed, he might have been eligible to recover his travel costs under Penal Code section 1334.4, subdivision (a), but there is no evidence Mr. Redding's trial attendance was compelled by subpoena.

The travel expenses of $1,518.75 for Mr. Redding will be taxed.

Partial Transcript:

Item number 9 will be taxed in the amount of $17.50 because it is for a reporter's transcript, and there is no evidence that the transcript was court ordered. (Graham Decl. ¶ 3.) Code of Civil Procedure section 1033.5, subdivision (b)(5) prohibits recovery of transcripts of court proceedings not ordered by the court. Kohler argues that it was necessary to have the portion of the transcript which contained the Court's ruling. However the court is powerless to award costs expressly forbidden by statute.

Models, Blowups, and Photocopies of Exhibits:

Item number 11 claims $1,964.96 for "models, blowups, and photocopies of exhibits." Allowable costs include "[m]odels and blowups of exhibits and photocopies

of exhibits ... if they were reasonably helpful to aid the trier of fact." (See Code Civ. Proc. § 1033.5, subd. (a)(12).)

They were used by the court in making its decision and therefore, costs are allowed.

"Other"

Item number 13 claims $1,920.61 in "other" expenses. Under the description of "other" defendant has noted "mediation, court-related and filing fees of documents with Court" and "Mediation, Court-related and fees for filing MSC/Trial documents." In its Opposition, Kohler breaks the costs down as follows: $251.10 for the mediation; $163 for two CourtCall fees; $112.47 for attorney-service fees to file Kohler's Mandatory Settlement Conference Statement; and $1,394.04 in travel fees.

Mediation Fees

The court in *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202 awarded fees for court-ordered mediation, and this court's Standing Order No. 07-0628 requires the parties to engage in some form of ADR. However, there is no authority that in town counsel can recover all of his or her costs for in town travel. This is a cost of doing business. The Court taxes the travel costs of $26.10.

CourtCall

Code of Civil Procedure section 1033.5 provides costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) and (3).) The Court allows CourtCall fees.

Attorney-Service Fees

Section 1033.5 expressly disallows postage and copying costs. (Code Civ. Proc. § 1033.5, subd. (b)(3). Courier or fax filing fees are simply a more expensive, more convenient form of postage. The Court disallows the $112.47.

Travel Expenses

Kohler seeks $1,058.89 for bringing its Manager of Corporate Insurance, Brian Christensen, out to Fresno from Wisconsin for the Mandatory Settlement Conference, plus another $335.15 for Kohler's counsel's travel expenses related to the trial and Mandatory Settlement Conference. There is absolutely no authority for recovering the cost of an employee's travel to attend a Mandatory Settlement Conference.

However, there is no authority preventing these fee awards from being made. These costs were "necessary" to the conduct of the litigation and they are reasonable in amount. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) (3) and (4).) They will not be taxed.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 6/4/2012 .
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***U.S. Bank, N.A. v. Clovis Herndon Ventures, LLC, et al.***
Case no. 10CECG02973

Hearing Date: **June 5, 2012 (Dept. 502)**

Motion: To: (1) approve the receiver's final report and account; (2) discharge the receiver and terminate the receivership; and (3) exonerate the receivership bond

Tentative Ruling:

To grant pursuant to California Rules of Court (CRC) rule 3.1184.

Explanation:

The receiver, Mr. Weinstein, does not represent in his supporting declaration the actual date that he took possession of the property. Also Mr. Weinstein does not represent that he was in continuous possession of the property until the foreclosure, but it is apparent from the monthly reports that he was in continuous possession. It appears to the court that the report for the month ending September of 2011 was inadvertently omitted from the final report attached to the moving papers. The court notes that this is a minor omission. Also, although the total amount of fees charged in connection with the receivership may be deduced from the monthly reports, Mr. Weinstein does not state in his declaration the total amount of receivership fees charged. Notwithstanding these deficiencies, the court approves the receiver's final report and account. The amount of the receiver's fee or compensation and expenses and attorney fees properly chargeable against the receivership property is within the sound discretion of the trial court. (*Melikian v. Aquila, Ltd.* (1998) 63 Cal. App.4th 1364, 1368; *People v. Riverside University* (1973) 35 Cal.App.3d 572, 587; and *Maggiora v. Palo Alto Inn, Inc.* (1967) 249 Cal.App.2d 706, 713.)

CRC rule 3.1184(a)(2) requires that the receiver present a request for discharge. A receiver only may be discharged by order of the court. (*Hanno v. Superior Court* (1939) 30 Cal.App.2d 639. *See also City of Santa Monica v. Gonzalez* (2008) 43 Cal. 4th 905.) Mr. Weinstein's motion complies with these requirements.

Mr. Weinstein has complied with CRC rule 3.1184(a)(3), which requires that the receiver present a request for exoneration of the receiver's surety. Upon approval of the receiver's report and accounting, the receiver normally is discharged, and the bond is exonerated; the discharge and settling is res judicata as to all claims against the receiver unless the receiver fails to disclose a lawsuit against him or notify adverse parties in that suit of the receive discharge proceedings. (*Aviation Brake Systems, Ltd. V. Voorhis* (1982) 133 Cal.App.3d 230, 234; and *Vitug v. Griffin* (1989) 214 Cal.App.3d 488, 494-495.)

Pursuant to CRC rule 3.1312 (a) and California Code of Civil Procedure 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **DSB** (Judge's initials) **on** **6-4-12** (Date).

(19) **Tentative Ruling**

People v. Pierce
Superior Court Case No. 10CECG01062

Hearing Date: June 5, 2012 (Department 503)

Motion: For stay pending criminal matter resolution, by defendants and cross-complainants San Joaquin Accident and Medical Group, Inc., Pierce, Arakelian, Lewis, Lee, and by defendants Ros, Aguayo, Mrs. Pierce, Walker, Sheaffer, Murphy, Drake, Pierce & Rios Medical Corporation, Inc., Rios & Pierce Medical Corporation, Inc., P&R Med-Legal Medical Corporation, Inc., and Arakelian Chiropractic

Joinder by defendant Tomas Ballasteros Rios

Tentative Ruling:

To grant a stay until December 5, 2012, on condition that defendants agree plaintiffs have 30 days from the lifting of a stay to move to compel further discovery responses for which a motion could be filed as of the hearing date. To set a status conference for 12-5-2012 and order that the parties file briefs regarding the status of the Kern County criminal investigation on or before 11-20-2012.

Explanation:

Federal law on this issue is markedly different from California law, with California's protection being broader. For example, in a federal case one is permitted to draw a negative inference from a refusal to answer a question based on assertion of the Fifth Amendment.

That is not true in California's state courts. Evidence Code section 940 states: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

Penalizing a witness by allowing a negative interference to be drawn from assertion of a privilege against self-incrimination is barred under California law. *Pacers v. Superior court* (1984) 162 Cal. App. 3d 686.

"[T]he privilege forbids compelled disclosures which could serve as a 'link in a chain' of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness." *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 326.

However, a blanket refusal to testify or produce evidence is unacceptable. (*Id*. at 1045.) There must be some nexus between the information requested and the risk of criminal prosecution and conviction. *Troy v. Superior Court* (1986) Cal.App.3d 1006, 1012-1013.) "If the witness swears under oath that the answer might tend to incriminate

him, he should be allowed great latitude and the court should sustain his claim of privilege unless it is clear that the answer could have no tendency to incriminate." *In re Leavitt* (1959) 174 Cal.App.2d 535, 538.

Evidence Code section 404 states:

> "Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege."

Moving parties have shown a viable and present concern over criminal prosecution through the presentation of search warrants materials showing such activity in 2011 and 2012. But the second part of their burden of persuasion, a showing of an attempt to gain possibly incriminating evidence, is absent. They have refused to answer discovery as to their own allegations in their own cross-complaint on this basis, as shown by Exhibit A to Ms. Facciani's declaration. They did not argue that the questions therein might drawn out information tending to incriminate the individual defendants.

There is also the fact that in *Avant Corporation v. Superior Court* (2000) 79 Cal. App. 4th 876, the Court denied a writ of mandate request by a corporation because that type of entity had no Fifth Amendment rights. "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." (*Id*. at 884, quoting from *Wilson v. United States* (1911) 221 U.S. 361, 382).

As for document demands, with regards to the privilege against self-incrimination, *Andersen v. Maryland* (1976) 427 U.S. 463, 473, recites this general principle: " 'A party is privileged from producing the evidence but not from its production.' *Johnson v. United States*, 228 U.S. 457, 458 (1913)." . See also *Fisher v. U.S.* (1976) 425 U.S. 391, *U.S. v. Doe* (1984) 465 U.S. 605, and *U.S. v. Hubbell* (2000) 530 U.S. 27.

In fact, these cases indicate that compelled production of records ***does*** implicate the Fifth Amendment privilege, as the act of production would involve tacit testimonial aspects and incriminating effect, including an admission that the records existed, that they were in the individual's control, and that they were what the subpoena described. *U.S. v. Doe, supra.* The government can go with a search warrant and seize materials, but cannot sit a defendant down and force him or her to authenticate them or swear all are present, etc. Nor may a private litigant do so. A corporation can provide discovery responses only through its agents, and opposing party does not dispute that the named individuals are also the ones verifying corporate discovery answers in this case.

Waiver does not appear either. The criminal investigation shows activity in 2008, then none for some time. The record before the Court shows it revived last year, after the cross-complaint was filed. Once cannot waive a privilege that likely does not exist at the time. There has to be a viable ongoing investigation or criminal case for the privilege to apply.

In terms of time and expense, allowing the case to continue while there is clearly a criminal investigation going on would involve massive expense and waste for the parties and the Court. Any good lawyer (and there are more than a few here) would err far on the side of caution in asserting the privilege and instructing the client not answer questions.

Conversely, a stay will preserve the status quo, and will permit plaintiffs to revive any motion to compel further responses to the present discovery upon the dissolve of the stay. The stay is short, six months, and the Court intends to keep a close eye on the matter.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-4-12** (Date).

Tentative Ruling

(17)

Re: ***Clark v. Sierra Pathology Laboratory, Inc. et al.***
Superior Court Case No. 10 CECG 04233

Hearing Date: June 5, 2012 (Dept. 403)

Motion: Motion for Protective Order

Tentative Ruling:

To deny.

Explanation:

Defendant Has Not Carried His Burden of Establishing the Review was "Peer Review"

Defendant Honda and his medical Group, Pathology Associates claim that document BMJ00008 is privileged under Evidence Code section 1157. That section provides, in relevant part:

> Neither the proceedings nor the records of organized committees of medical … staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body … shall be subject to discovery.

(Evid. Code § 1157, subd. (a).)

Accordingly to fall within the ambit of section 1157, the desired discovery must be a proceeding or a record of: 1) an organized committee of a medical staff in a hospital or 2) a "peer review body" as that term is defined in Business & Professions Code section 805.

It is undisputed that Dr. Honda and his group, Pathology Associates are not a "hospital." Drs. Harding and Pitts must therefore, meet the definition of a "peer review body" as defined in Business & Professions Code section 805. That section reads as follows:

> (B) "Peer review body" includes:
>
> (i) A medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code or of a facility certified to participate in the federal Medicare Program as an ambulatory surgical center.

(ii) A health care service plan licensed under Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code or a disability insurer that contracts with licentiates to provide services at alternative rates of payment pursuant to Section 10133 of the Insurance Code.

(iii) Any medical, psychological, marriage and family therapy, social work, professional clinical counselor, dental, or podiatric professional society having as members at least 25 percent of the eligible licentiates in the area in which it functions (which must include at least one county), which is not organized for profit and which has been determined to be exempt from taxes pursuant to Section 23701 of the Revenue and Taxation Code.

(iv) A committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members or employees of that entity.

(Bus. & Prof. Code § 805, subd. (a)(1)(B).)

The points and authorities for this motion simply asserts, "Pathology Associates is a health care facility properly licensed under the Health and Safety Code" and that the review done by Doctors Pitts and Harding was done under Business and Professions Code section 805, subdivision (a)(1)(A)(i)(II), and therefore constitutes peer review covered by section 1157.

The burden of establishing entitlement to nondisclosure under Evidence Code section 1157 rests with the parties resisting discovery, not the party seeking it. (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 627; *Brown v. Superior Court* (1985) 168 Cal.App.3d 489, 501.) The only evidence that Pathology Associate is a "health care facility" is Dr. Honda's Declaration. In this regard, he avers that "Pathology Associates is a health care facility, properly licensed under the Health and Safety Code." Notably he does not state that Pathology Associates is licensed under Division 2 of the Health and Safety Code. Nor does he provide any foundational facts that would allow the reader to determine how Pathology Associates qualifies as a "health care facility" such that section Business & Professions Code section 805 applies:

A medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code or of a facility certified to participate in the federal Medicare Program as an ambulatory surgical center.

(Bus. & Prof. Code § 805, subd. (b)(i)(II).)

Nor does it seem likely that Pathology Associates would qualify as a "health care facility," as that term is used in Division 2 of the Health & Safety Code. Division 2 does not define "health care facility," but does define clinic and "health facility." A clinic is:

[A]n organized outpatient health facility that provides direct medical, surgical, dental, optometric, or podiatric advice, services, or treatment to patients who

> remain less than 24 hours, and that may also provide diagnostic or therapeutic services to patients in the home as an incident to care provided at the clinic facility. Nothing in this section shall be construed to prohibit the provision of nursing services in a clinic licensed pursuant to this chapter. In no case shall a clinic be deemed to be a health facility subject to the provisions of Chapter 2 (commencing with Section 1250). A place, establishment, or institution that solely provides advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury, where that advice, counseling, information, or referral does not constitute the practice of medicine, surgery, dentistry, optometry, or podiatry, shall not be deemed a clinic for purposes of this chapter.
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> (Health & Welf. § 1200, subd. (a).)

Pathology Associates would not seem to be a clinic, as there is nothing in the nature of pathology which would indicate that "direct" "outpatient" "medical" "advice, services, or treatment to patients" on site. Certainly there is no evidence that this is how Pathology Associates operates.

A "health facility," by contrast is:

> [A]ny facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer… .

(Health & Saf. Code § 1250.)

A "health facility includes a "general acute care hospital," "rural general acute care hospital," "acute psychiatric hospital," "skilled nursing facility," "intermediate care facility," "intermediate care facility/developmentally disabled habilitative," "special hospital," "intermediate care facility/developmentally disabled," "intermediate care facility/developmentally disabled-nursing," "congregate living health facility," "correctional treatment center," "nursing facility," "intermediate care facility/developmentally disabled-continuous nursing (ICF/DD-CN)," none of which would seem to describe a collective of pathologists in private practice, as it would seem very unusual if a pathology practice were to admit patients at all, let alone for more than 24 hours. Again, there is essentially no evidence to support that Pathology Associates is a "health facility" within the meaning of the Health and Safety Code.

Nor could Doctors Pitt's and Harding's activities be construed as that of a peer review group under any other provisions of the code on the limited information before the court. Pathology Associates is not apparently a "health care service plan." (See Bus. & Prof. Code § 805, subd. (a)(1)(B)(ii).) It is not a medical professional society. (See Bus. & Prof. Code § 805, subd. (a)(1)(B)(iii).) Finally, there is no evidence that Pathology Associates employs more than 25 licentiates of the same class and that Doctors Pitts and Harding function as a committee for the purpose of reviewing the quality of

professional case provided by members of employees of that entity. (See Bus. & Prof. Code § 805, subd. (a)(1)(B)(iv).)

Absent evidence that Doctors Pitts and Harding fall within the definition of "peer review group" there is no benefit to be gained from analyzing whether they conducted a form of peer review.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/4/12 .
(Judge's initials) (Date)